CASE NO. 81-6782

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

MICHAEL MACK, Petitioner,

v.

THE STATE OF OKLAHOMA, Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF OKLAHOMA

PETITION FOR WRIT OF CERTIORARI

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SUPREME COURT, U.S.

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QUESTIONS PRESENTED

1. Should this Court's decision in Carter v. Kentucky, requiring instruction of trial juries regarding the privilege against self-incrimination, be given full retroactive effect?

2. If not, should the Carter decision be applied in cases which were pending on direct appeal when the Carter decision was rendered?

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CASE NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

MICHAEL MACK, Petitioner,

v.

THE STATE OF OKLAHOMA, Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF OKLAHOMA

The Petitioner, Michael Mack, requests that a writ of certiorari issue to review the judgment of the Court of Criminal Appeals of Oklahoma entered in this case on March 2, 1982.

OPINION BELOW

The opinion of the Court of Criminal Appeals of Oklahoma, which is reported at 641 P.2d 1122 (Okla. Cr. 1982), appears in Appendix A. No opinions were rendered by the trial court.

JURISDICTION

The Petitioner is seeking a writ of certiorari to the Court of Criminal Appeals of Oklahoma in order to review a judgment entered on March 2, 1982. A petition for rehearing was denied by the Court of Criminal Appeals on March 25, 1982. Jurisdiction is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED IN THE CASE

United States Constitution, amendment V, provides in pertinent part:

> No person ... shall be compelled in any criminal case to be a witness against himself ... .

United States Constitution, amendment XIV, section 1, provides, in pertinent part:

> ... nor shall any State deprive any person of life, liberty or property, without due process of law ... .

STATEMENT OF THE CASE

The Petitioner was charged in an Oklahoma state trial court with Robbery with Firearms, 21 Okla. Stat. § 801 (Supp. 1976), in connection with the alleged armed robbery of a Tulsa woman at a car wash (R. 5-6).* A trial jury found the Petitioner guilty; during a separate recidivist sentencing proceeding, he was sentenced by the jury to sixty (60) years imprisonment (R. 23-24, 49).

The Petitioner did not testify at his trial, which was held in December of 1979. The Petitioner's trial counsel requested the trial court to deliver a jury instruction cautioning the jury against drawing any adverse inference from the Petitioner's failure to testify. The requested instruction was not delivered (Tr. 129; R. 25-34).

The Petitioner appealed his conviction to the Court of Criminal Appeals of Oklahoma. While the appeal was pending, this Court announced its decision in Carter v. Kentucky, 450 U.S. 288 (1981), holding that refusal to deliver a jury instruction cautioning against adverse inferences from the failure to testify violated the Fifth Amendment. The Carter decision was announced on March 9, 1981.

In ruling on the Petitioner's contention that refusal to deliver the requested cautionary instruction violated the Fifth Amendment, the Court of Criminal Appeals stated: "Although we are bound by the decision of the Supreme Court, they did not

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* The record in the Court of Criminal Appeals of Oklahoma comprises a bound record, consisting of instruments filed in the trial court (hereafter referred to as R.), and a trial transcript (hereafter referred to as Tr.).

hold that the ruling in Carter was retroactive, and in light of our previous rulings, we hold that the decision in Carter, should be applied prospectively only" (Appendix A at 3). The Petitioner's conviction was affirmed.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

The federal questions were raised in the trial court during an instructions conference between the court and counsel. The Petitioner's counsel stated:

> We would ask that the Court give the stock instruction with regard to the fact that the jury is not to draw any inference from the fact that the Defendant himself has not testified (Tr. 129).

The trial judge did not rule on this request, but did not deliver the requested instruction (R. 25-34).

On appeal to the Court of Criminal Appeals of Oklahoma, the federal questions were raised in Assignment 14 of the Amended Petition in Error and in Proposition I of the Brief of Appellant ("The trial court erred in refusing defendant's request for instruction 'that the jury is not to draw any inference from the fact that the defendant has not testified'"). The Brief stated: "Such an instruction is required by the United States Constitution: failure to give the instruction was in violation of Mr. Mack's fifth amendment rights" (Brief of Appellant at 7).

The Court of Criminal Appeals addressed the Petitioner's contention that the no-inference instruction "is required by the United States Constitution, when requested" (Appendix A at 2). The Court of Criminal Appeals held that this Court's decision in

Carter v. Kentucky was not retroactive, and affirmed the Petitioner's conviction (Appendix A at 3). A petition for rehearing was denied (Appendix B and C).

REASONS FOR GRANTING THE WRIT

1. The Decision Below, Which Denies Retroactive Effect to Carter v. Kentucky, Is Inconsistent with Decisions of Other State Appellate Courts.

In the decision below, the Court of Criminal Appeals of Oklahoma held that this Court's decision in Carter v. Kentucky, 450 U.S. 288 (1981) would not be applied in the Petitioner's case. The Petitioner's trial preceded the Carter decision; his case was pending on direct appeal when the Carter decision was announced. Several other state appellate courts have been presented with the same situation: all of these courts have reached conclusions inconsistent with that of the Court of Criminal Appeals of Oklahoma.

In People v. Crawford, 632 P.2d 626 (Colo. App. 1981) and Mosley v. State, 402 So. 2d 559 (Fla. App. 1981), state appellate courts reversed convictions in cases in which a trial court had refused to deliver a no-inference instruction, relying on the Carter decision. Although neither opinion specifies the date of trial, both cases were decided shortly after the Carter decision: presumably the trials in both cases antedated Carter.* Neither court expressly addressed the retroactivity issue.

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* Crawford was decided less than 2 months after the Carter decision. Mosley was decided 5½ months after the Carter decision.

In Richardson v. State, 402 So. 2d 848, 851-52 (Miss. 1981) and People v. Silver, 121 Cal. App. 3d 533, 175 Cal. Rptr. 483, 493-94 (1981), two other state appellate courts considered refusals to deliver no-inference instructions. The Silver opinion indicates that the defendant was tried before the Carter decision. The Richardson opinion does not reveal the defendant's trial date; however, since the Richardson opinion was handed down shortly (5½ months) after the decision in Carter, the trial date presumably antedated the Carter decision. Both the Richardson and Silver courts acknowledged the applicability of Carter, but held that any error was harmless under the constitutional harmless error doctrine of Chapman v. California, 386 U.S. 18 (1967). Neither court expressly addressed the retroactivity question.

The Crawford, Mosley, Richardson and Silver decisions are all based on the implicit assumption that this Court's decision in Carter v. Kentucky should be accorded retroactive effect, at least as to cases pending on direct review when the Carter decision was announced. As such, these decisions are inconsistent with the conclusion reached by the Court of Criminal Appeals of Oklahoma in this case.

The decision below and the Crawford, Mosley, Richardson, and Silver decisions establish a conflict which should be resolved by this Court. The number of cases (at least 5) in which the issue has thus far been presented indicates that the retroactitivy of the Carter decision is a recurring question having practical significance in a number of states. A writ of certiorari should be granted to review the disposition of this issue by the Court of Criminal Appeals of Oklahoma.

2. The Decision Below Is Inconsistent With the Principles of Retroactivity Established by This Court.

The question raised by the decision of the Court of Criminal Appeals of Oklahoma is a significant one, as is confirmed by the number of courts which have been presented with the question, and by the (partially) divergent answers which have been provided. Furthermore, the disposition of this question by the Court of Criminal Appeals is not in accord with the retroactivity principles which have been established by this Court.

In Chevron Oil Co. v. Huson, 404 U.S. 97, 106 (1971), this Court stated that, in order for one of its decisions to be limited to prospective effect, the decision "must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied ... or by deciding an issue of first impression whose resolution was not clearly foreshadowed." The Petitioner submits that the result in Carter v. Kentucky was "clearly foreshadowed" both by this Court's earlier decisions and by the weight of authority across the nation; the Carter decision is therefore entitled to full retroactive effect.

The decision in Carter did not involve the overruling of any of this Court's precedents: indeed, on two prior occasions this Court had expressly left open the question of whether the Fifth Amendment required delivery of a requested no-inference instruction. See Carter v. Kentucky, 450 U.S. at 295. The weight of authority across the nation provided a significant clue as to how this question would be answered: delivery of a no-inference instruction, upon request, had been required in the federal courts since the decision in Bruno v. United States,

308 U.S. 287 (1939), and was likewise required, upon request, in a majority of the states. Indeed, the Court's opinion in Carter identified only five (5) states, including Oklahoma, which prohibited delivery of a no-inference instruction. 450 U.S. at 290 & n.2.

Further anticipation of the Carter decision was provided by two 1978 decisions of this Court: Lakeside v. Oregon, 435 U.S. 333 (1978), and Taylor v. Kentucky, 436 U.S. 478 (1978). In Lakeside, the Court found no constitutional error in delivery of a no-inference instruction over a defendant's objection. The Court noted that "[t]he very purpose of a jury charge is to flag the jurors' attention to concepts that must not be misunderstood, such as reasonable doubt and burden of proof. To instruct them in the meaning of the privilege against compulsory self-incrimination is no different." 435 U.S. at 340.

In Taylor, the Court held that a jury instruction on the presumption of innocence was constitutionally required; in view of the statement in Lakeside that instruction on the privilege against self-incrimination is "no different", it is submitted that Taylor and Lakeside left little doubt as to the conclusion to be reached in Carter: a no-inference instruction would be constitutionally required.

Since the Carter decision did not overrule any of this Court's prior decisions, and was "clearly foreshadowed" by earlier decisions of this Court, it was entitled to full retroactive effect, under Chevron Oil Co. v. Huson, 404 U.S. 97 (1971). Since the result in Carter meets the threshhold requirement of "clear foreshadowing", it is unnecessary to address whether

Carter meets the Court's other criteria for prospective application.* See United States v. Ross, 655 F.2d 1159, 1189 (D.C. Cir. 1981) (Wilkey, J., dissenting), cert. granted, 102 S.Ct. 386 (1982).

Even if full retroactive effect were not to be accorded to Carter, this Court's decisions would still require that Carter be applied to the limited class of persons, including the Petitioner, whose convictions were not final when the Carter decision was announced. As the Court noted in Hamling v. United States, 418 U.S. 87, 102 (1974), "[o]ur prior decisions establish a general rule that a change in the law occurring after a relevant event in a case will be given effect while the case is on direct review."

The conclusion that Carter should be applied to cases pending on direct appeal when Carter was decided finds support in this Court's decision in Tehan v. United States ex rel. Shott, 382 U.S. 406, 409 & n.3 (1966). There, the Court stated that the rule of Griffin v. California, 380 U.S. 609 (1965), prohibiting prosecutorial comment on a defendant's failure to testify, would be applied to cases on direct review when the Griffin decision was announced. See O'Connor v. Ohio, 385 U.S. 92, 93 (1966). Since both Griffin and Carter enforced the same Fifth Amendment privilege against self-incrimination, it is submitted that Carter

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* In Stovall v. Denno, 388 U.S. 293 (1967), the Court prescribed three other factors to be considered in limiting the retroactive effect of a new decision: (1) the purpose of the new result; (2) the extent to which law enforcement officials may have relied on the previous law; and (3) the impact of retroactivity on the administration of justice.

should likewise be applied to cases pending on direct review when Carter was announced.

In one of this Court's most recent discussions of the retroactivity question, two members of the Court concluded that "new constitutional rules should apply retroactively 'in cases still pending on direct review ...'." Brown v. Louisiana, 447 U.S. 323, 337 (1980) (Powell, J., concurring). " ... [T]his approach is closer to the ideal of principled, evenhanded judicial review than is the traditional retroactivity doctrine." Hankerson v. North Carolina, 432 U.S. 233, 248 (1977) (Powell, J., concurring). Since the Petitioner's conviction was still pending on direct review when Carter was announced, the rule of Carter should be applied to him.

The decision below is inconsistent with this Court's decisions -- whether the Carter decision is regarded as fully retroactive, or as applicable only to cases pending on direct review when the Carter decision was announced. A writ of certiorari should issue to review the disposition of the retroactivity issue by the Court of Criminal Appeals of Oklahoma.

CONCLUSION

For the reasons stated, the Petitioner requests that a writ of certiorari be granted.

Respectfully submitted,

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FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA
MAR 2 1982
Ross N. Lillard, Jr.

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

MICHAEL MACK,)
)
Appellant,)
)
-vs-) No. F-80-407
)
THE STATE OF OKLAHOMA,)
)
Appellee.)

FOR PUBLICATION

AUTHORIZED FOR FILING
MAR 2 1982
COURT OF CRIMINAL APPEALS

- O P I N I O N -

BUSSEY, Judge:

The appellant, Michael Mack, hereinafter referred to as the defendant, was convicted in the District Court of Tulsa County, Case No. CRF-79-1749, for the offense of Robbery with a Firearm, in violation of 21 O.S.Supp.1980, § 801, After Former Conviction of a Felony. He was sentenced to sixty (60) years' imprisonment, and he appeals.

On June 18, 1979, at approximately 9:20 p.m., the defendant and B.T., a juvenile, were in the parking lot of the Crystal City Shopping Center, and Paula Ruth Perkins was washing her car at a carwash at that location. The defendant and B.T. walked over to Ms. Perkins, where the defendant placed a revolver to her head, and told her to get into the back seat of the car and lie face down. She did as she was told to do, and the defendant and B.T. got into the car and drove around for approximately thirty (30) minutes. They stopped the car on the north side of Tulsa and told Perkins to get out. She got out and they drove away in the car. At no time did Ms. Perkins see the defendant or B.T.

After Ms. Perkins was released she went to the home of Jerry Harmon, who called the police. When the police arrived at the Harmon residence, Perkins told them what had happened and gave them a description of her car.

Early the following morning, at approximately 1:15 a.m., Tulsa Police Officer Jerry Cleary observed a vehicle which matched the description of Paula Perkins' car. The vehicle pulled into the

parking lot of the Soul Brother's Lounge, and the officer followed the car into the parking lot. He observed two people walking toward the lounge, one of whom he identified as the defendant and the other he identified as B.T. The two entered the lounge and came back out immediately. At that time, Officer Cleary took them into custody.

B.T. was taken to the police station where he gave a statement as to what had happened the previous evening. In that statement he told the officers where they could find the gun used in the robbery.

B.T. was sent to the juvenile correction center at Helena, for his part in the crime. He was released after his eighteenth (18th) birthday, which was approximately eight (8) days before the trial of the defendant, and he testified at the trial as a witness for the State.

I.

In his first assignment of error the defendant urges that the trial court committed fundamental error by failing to instruct the jury that "the jury is not to draw any inference from the fact that the defendant himself has not testified." The defendant contends that such an instruction is required by the United States Constitution, when requested, citing the recent Supreme Court decision of Carter v. Kentucky, _____ U.S. _____, 101 S.Ct. 1112, 67 L.Ed.2d 241 (1981).

In this jurisdiction the trial court is prohibited from making any mention of the defendant's failure to testify by statute, 22 O.S.1981, § 701. This Court has repeatedly held that to give an instruction on the defendant's failure to testify, such as the one the defendant in this case requested, is reversible error. Ellis v. State, 558 P.2d 1191 (Okl.Cr.1977); and Villines v. State, 492 P.2d 343 (Okl.Cr.1971). In Carter, supra, the Supreme Court stated that:

> The freedom of a defendant in a criminal trial to remain silent 'unless he chooses to speak in the unfettered exercise of his own free will' is guaranteed by the Fifth Amendment and made applicable to state criminal proceedings through the Fourteenth. Malloy v. Hogan, 378 U.S., at 8, 84 S.Ct. 1489, 12

> L.Ed.2d 653. And the Constitution further guarantees that no adverse inferences are to be drawn from the exercise of that privilege. Griffin v. California, supra. Just as adverse comment on a defendant's silence 'cuts down on the privilege by making its assertion costly,' Griffin, 380 U.S., at 614, 85 S.Ct. 1229, 14 L.Ed.2d 106, 5 Ohio Misc 127, 32 Ohio Ops 2d 437, the failure to limit the jurors' speculation on the meaning of that silence, when the defendant makes a timely request that a prophylactic instruction be given, exacts an impermissible toll on the full and free exercise of the privilege. Accordingly, we hold that a state trial judge has the constitutional obligation, upon proper request, to minimize the danger that the jury will give evidentiary weight to a defendant's failure to testify.

Although we are bound by the decision of the Supreme Court, they did not hold that the ruling in Carter was retroactive, and in light of our previous rulings, we hold that the decision in Carter, should be applied prospectively only. See, Annotation 22 L.Ed.2d 821, "United States Supreme Court's Views as to Retroactive Effect of its Own Decisions Announcing New Rules." Accordingly, the defendant's first assignment of error must fail.

II.

In the defendant's next assignment of error he contends that the State failed to sufficiently corroborate the accomplice's testimony. It is not necessary to detail all the evidence involved. It is sufficient to say that the testimony of the accomplice, B.T., was corroborated in many details by other witnesses, including the victim. If there is one material fact that corroborates an accomplice's testimony the jury is free to infer the general truthfulness of the witness. Roberts v. State, 571 P.2d 129 (Okl.Cr.1977). Since the law prescribes no standard for strength of corroborating evidence, this Court will view that evidence in the strongest light. Leppke v. State, 559 P.2d 459 (Okl.Cr.1977). From an examination of the entire record we are of the opinion that the jury was presented with sufficient evidence to infer that B.T. gave truthful testimony. Therefore, we reject this assignment of error.

III.

The final contention is that the presentation of the judgment and sentence record of the defendant's previous felony conviction was not sufficient evidence to prove the former conviction.

We find this contention to be without merit. In the absence of rebutting evidence the judgment and sentence record alone is sufficient to support a finding that there had been a former conviction. Tucker v. State, 620 P.2d 1314 (Okl.Cr.1980).

Although there were numerous other propositions of error, they were not properly preserved for appeal.[1]

For all the reasons above set forth, the judgment and sentence appealed from is AFFIRMED.

AN APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY, OKLAHOMA
THE HONORABLE JAY DALTON, DISTRICT JUDGE

MICHAEL MACK, appellant, was convicted in Tulsa County District Court, of Robbery with Firearms, After Former Conviction of a Felony, and sentenced to sixty (60) years' imprisonment. AFFIRMED.

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[1]Proposition three (3) stated that the court committed error in failing to instruct the jury properly concerning accomplice corroboration and accomplice liability.

Defendant's proposition four (4) contended that fundamental error occurred when the court failed to define the elements of robbery in the instructions to the jury.

Proposition five (5) was that the jury did not receive clear instructions concerning fear.

Proposition six (6) stated that the State failed to prove a prior conviction at the preliminary hearing.

Proposition eight (8) was asserted as error because evidence concerning a dog's actions at the scene of arrest was admitted.

Proposition nine (9) stated that the prosecutor made improper comments during the punishment stage of the trial which inflamed the jury and caused excessive punishment to be set.

Proposition of error ten (10) contended that the court erred in accepting an ambiguous punishment verdict.

Proposition eleven (11) stated that the trial court committed fundamental error in delegating the reading of jury instructions to a bailiff.

Propositions four (4), five (5), and six (6) were not preserved for appeal because no objection to the proposed error was made at trial.

Proposition nine (9) was not preserved for appeal. The defendant did not request that the jury be admonished to disregard the prosecution's comments. Sallee v. State, 544 P.2d 902 (Okl. Cr.1975).

Propositions three (3), eight (8), ten (10) and eleven (11) were not presented in the motion for new trial. See, Hawkins v. State, 569 P.2d 490 (Okl.Cr.1977).

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OPINION BY BUSSEY, J.
BRETT, P.J., CONCURS IN RESULTS
CORNISH, J., CONCURS

APPENDIX B

Petition for Rehearing in the Court
of Criminal Appeals of Oklahoma

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

FILED
COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA
MAR 22 1982
Ross N. Lillard, Jr.
CLERK

MICHAEL MACK,

Appellant,

v.

THE STATE OF OKLAHOMA,

Appellee.

Case No. F-80-407

PETITION FOR REHEARING

The Petitioner, Michael Mack, appears by his attorney and requests that rehearing be granted in the above-styled case. The grounds for rehearing will be stated separately below.

I.

THIS COURT SHOULD RECONSIDER ITS VIEW REGARDING THE TRIAL COURT'S REFUSAL TO INSTRUCT ON THE DEFENDANT'S FAILURE TO TESTIFY. SUCH RECONSIDERATION IS NECESSARY BECAUSE THE QUESTION OF RETROACTIVITY IS NOT DISPOSITIVE OF THE FIFTH AMENDMENT ISSUE PRESENTED TO THIS COURT.

After determining that the Carter v. Kentucky decision should not have retroactive effect, this Court decided that it was permissible to deny Mr. Mack his requested instruction concerning his failure to testify. Petitioner does not contest this Court's determination that Carter should not be applied retroactively. Rather, petitioner asserts that the Carter decision should be applied to Mr. Mack's case because Mr. Mack's appeal was pending at the time of the Carter decision.

In Griffin v. California, 380 U.S. 609, 85 S. Ct. 1229 (1965), the Supreme Court held that it was violative of the fifth amendment to the United States Constitution for the prosecution to comment on the defendant's failure to testify. As the Court noted in a later decision, which is critical to a correct resolution of Mr. Mack's case, the Griffin decision has no retroactive effect. O'Connor v. Ohio, 385 U.S. 92, 87 S. Ct. 252 (1966). In spite of the lack of retroactive effect, defendant O'Connor, whose appeal was pending at the time of the Griffin decision, was entitled to the benefit of the Griffin rule. Id.

Thus, Mr. Mack is not arguing now that Carter should be given retroactive effect. There is no reason why Carter should be applied in connection with those defendants whose appeals were decided before Carter. Rather, Mr. Mack submits that the rule of O'Connor permits an appellant to rely on a Supreme Court decision when

the Supreme Court decision occurs between the time of appellant's trial and the time of the resolution of the appeal.

Mr. Mack submits that, under the fifth and fourteenth amendments to the United States Constitution, he should be awarded a new trial. See Carter v. Kentucky, 101 S. Ct. 1112 (1981).

II.

THIS COURT SHOULD RECONSIDER ITS DETERMINATION THAT THE EVIDENCE WAS SUFFICIENT SINCE THE "CORROBORATING" EVIDENCE DOES NOT CONNECT MR. MACK WITH THE CRIME.

This Court's determination of sufficient evidence appears to rest on the correct conclusion that witness Perkins and some other witnesses testified concerning some of the same details as did accomplice Bobby Trimble. However, Mr. Mack submits that it is not enough that someone agreed with Trimble on the basics of how the crime occurred. For there to be sufficient evidence, there needed to be evidence, independent of Trimble, connecting Mr. Mack to the crime. Mr. Mack submits that no such evidence existed and that consequently there was insufficient evidence as a matter of law.

The evidence from Perkins indicates that Trimble indeed was a participant in the crime — that Trimble knew what he was talking about when he made certain of his statements as to how the crime was committed. However, Perkins's testimony does nothing to remove the suspicion that Trimble was wrongfully implicating Mr. Mack to save Trimble's own skin.

Perkins admitted that she did not see Mr. Mack at the scene of the robbery or anywhere near the scene of the robbery, either in time or location. Therefore, her testimony is insufficient to corroborate Trimble's testimony. Mr. Mack submits that likewise no other witness's testimony provided the requisite type of corroboration.

In addition to the authorities cited in Proposition II of the Appellant's brief in this case, Mr. Mack wishes to rely on the recent case of Giddens v. State, Case No. F-78-164 (Okl. Cr. 1981) (unpublished decision). Mr. Macks submits that, if the principles set forth in Giddens were to be applied to Mr. Mack's case, a reversal would be necessitated in the case at bar. In Giddens, this Court quoted with emphasis the following statute: "A conviction cannot be had upon the testimony of an accomplice unless he be corroborated by such other evidence as tends to connect the defendant with the commission of the offense, and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof." 22 O.S. 1981, § 742. By statute, then, Perkins's testimony was not sufficiently corroborative

because her testimony showed only the commission of an offense and the circumstances of the commission. Further, the evidence which came from persons other than Perkins and Trimble was testimony which lacked the necessary independence from Trimble's testimony.

The Giddens case is particularly applicable because it shows that association between the accomplice and the defendant is not necessarily evidence corroborating the accomplice's story. In the instant case, evidence was presented, independent of Trimble, that Mr. Mack was in Trimble's company a few hours after the commission of the robbery. Similar association between the defendant and the accomplice was held to be insufficient in Giddens.

Mr. Mack submits that the lack of corroboration is much clearer in this case than it was in Giddens. It is further submitted that it would be impossible to justify upholding Mr. Mack's conviction without overruling a long line of Court of Criminal Appeals authority on accomplice corroboration.

III.

THIS COURT SHOULD REVIEW THE CONSTITUTIONAL ISSUE INVOLVED IN THE DETERMINATION THAT THE EVIDENCE OF PRIOR CONVICTION WAS SUFFICIENT. EVIDENCE OF PRIOR CONVICTION WAS INSUFFICIENT UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Petitioner agrees that, under Oklahoma authority which has existed for several years, the evidence of former conviction would be considered sufficient. However, since the time that Oklahoma began holding that a prior conviction could be established with only the presentation of judgment and sentence, it has been made clear that the fourteenth amendment to the United States Constitution requires that, for evidence to be sufficient, a reasonable person must be able to believe that beyond-reasonable-doubt proof exists. Jackson v. Virginia, 443 U.S. 307, 99 S. Ct. 2788 (1979). Further, it specifically has been held that identity of names between the defendant and the person previously convicted is insufficient to establish that the defendant is the person previously convicted. Gravatt v. United States, 260 F.2d 498 (10th Cir. 1958). See People v. Burnick, 27 Cal. App. 3d 326, 103 Cal. Rptr. 564 (1975).

In light of the above, Mr. Mack urges this Court to consider whether the evidence of prior conviction is sufficient under the fourteenth amendment to the United States Constitution.

IV.

THIS COURT SHOULD REEVALUATE THE EXTENT OF PRESERVATION OF THE ERRORS INVOLVING PROSECUTORIAL MISCONDUCT. THIS COURT ALSO SHOULD REEVALUATE THE SERIOUSNESS OF THE IMPROPRIETY.

In the footnote to this Court's opinion, this Court indicated that defense counsel did not request admonition in regard to instances of prosecutorial misconduct. Mr. Mack submits that in light of preservation beyond that which this Court apparently believed to be existent, see (Tr. 158), this Court should address the issue of prosecutorial misconduct on the merits. Further, it is clear that serious misconduct, such as that existing in Mr. Mack's case, should be reviewed even in the absence of objections or requests for admonition. E.g., Cobbs v. State, 629 P.2d 368 (Okl. Cr. 1981). In light of the above, the Court should reexamine the extent of prosecutorial misconduct in this case.

V.

THIS COURT SHOULD REEXAMINE CONTENTIONS THAT CERTAIN ASSIGNMENTS OF ERROR INVOLVED FUNDAMENTAL ERROR.

This Court, in footnote one of the opinion in this case, stated that it was declining to review certain of Mr. Mack's contentions. Mr. Mack urges this Court to reexamine its position that certain of these assignments of error involved fundamental error.

Of particular concern is this Court's apparent view that the defendant has no fundamental right to reasonably accurate instructions on the elements of the crime charged. Mr. Mack submits that it is basic to Oklahoma criminal law that the defendant has a fundamental right to instructions on the elements of the crime charged and to instructions concerning his defense. The fundamental right to instruction on the crime charged has long been recognized. Brook v. State, 6 Okl. Cr. 23, 115 P. 1026 (1911). Conviction when there has been no instruction accurately explaining the crime charged is in fact violative of the due process clause of the fourteenth amendment to the United States Constitution. See e.g., Cole v. Arkansas, 333 U.S. 196, 68 S. Ct. 514 (1948).

VI.

THIS COURT SHOULD REEVALUTE ITS POSITION THAT CERTAIN ERRORS ARE BEYOND THE SCOPE OF THE MOTION FOR NEW TRIAL. SINCE APPLICABLE STATUTORY LANGUAGE WAS USED IN THE MOTION FOR NEW TRIAL, THE MOTION FOR NEW TRIAL WAS SUFFICIENT TO COVER THE ASSIGNMENTS OF ERROR PRESENTED IN PROPOSITIONS THREE, EIGHT, TEN, AND ELEVEN OF THE APPELLANT'S BRIEF.

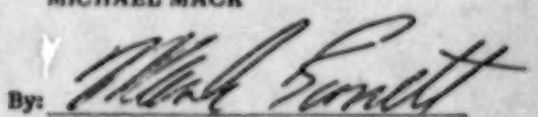
The Oklahoma statute on the grounds for new trial describes the grounds for new trial in general terms. Ground five is as follows: "When the court has misdirected the jury in a matter of law, or has erred in the decision of any question of law arising during the course of the trial." 22 O.S. 1981, § 953. Ground six indicates that a new trial may be granted "[w]hen the verdict is contrary to the law or evidence." Id. In the instant case, similar language was used in Mr. Mack's motion for new trial. It was alleged that "the verdict is contrary to law" and it was alleged that there was "error of law occuring at the trial, excepted to by the Defendant." Mr. Mack submits that since the statute indicates that such general language is appropriate, the motion for new trial provided an adequate basis for reviewing all errors presented in the Appellant's brief.

CONCLUSION

For the above-stated reasons, Mr. Mack requests that this petition for rehearing be granted.

Respectfully submitted,

MICHAEL MACK

By: 

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APPENDIX C

Order of the Court of Criminal Appeals
of Oklahoma Denying Petition for Rehearing

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA
MAR 25 1982
Ross N. Lillard, Jr.
CLERK

MICHAEL MACK,)
Appellant,)
-vs-) No. F-80-407
THE STATE OF OKLAHOMA,)
Appellee.)

ORDER DENYING PETITION FOR REHEARING
AND DIRECTING ISSUANCE OF MANDATE

NOW on this 25th day of March, 1982, after having examined the appellant's petition for rehearing in the above styled and numbered cause, and being fully advised in the premises, this Court finds that the same should be and hereby is DENIED. The Clerk of this Court is directed to issue the mandate forthwith.

IT IS SO ORDERED.

WITNESS OUR SIGNATURES AND THE SEAL OF THIS COURT this 25th day of March, 1982.

Tom Brett
TOM BRETT, PRESIDING JUDGE

Hez J. Bussey
HEZ J. BUSSEY, JUDGE

Tom R. Cornish
TOM R. CORNISH, JUDGE

ATTEST:

Robert T. Lillard Jr.
Clerk

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JUL 12 1982
OFFICE OF THE CLERK
SUPREME COURT, U.S.

CASE NO. 81-6782

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

MICHAEL MACK, Petitioner,

v.

THE STATE OF OKLAHOMA, Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF OKLAHOMA

SUPPLEMENTAL BRIEF OF PETITIONER

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CASE NO. 81-6782

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

MICHAEL MACK, Petitioner,

v.

THE STATE OF OKLAHOMA, Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF OKLAHOMA

SUPPLEMENTAL BRIEF OF PETITIONER

Since the Petition was filed in this case, this Court has announced its decision in United States v. Johnson, 50 U.S.L.W. 4742 (U.S. June 21, 1982). The Petitioner submits that the Johnson decision supports the grant of certiorari in this case.

In Johnson, the Court reconsidered its precedents on retroactivity of Fourth Amendment decisions and announced a new rule: "a decision of this Court construing the Fourth Amendment is to be applied retroactively to all convictions that were not yet final at the time of the decision." 50 U.S.L.W. at 4748. This rule was held subject to several exceptions; the Court expressly left open the question of whether the rule was applicable to decisions interpreting constitutional provisions other than the Fourth Amendment. 50 U.S.L.W. at 4748-49.

The case at bar presents the question of whether a decision of this Court interpreting the Fifth Amendment (Carter v.

Kentucky, 450 U.S. 288 (1981)) is to be applied retroactively to convictions not final at the time of the decision. The case thus offers the Court an opportunity to address and define the scope of the retroactivity principles announced in Johnson: do these principles extend beyond the Fourth Amendment?

The Petitioner would note that this Court's original formulation of retroactivity principles, as announced in Linkletter v. Walker, 381 U.S. 618 (1965) and Tehan v. United States ex rel. Shott, 382 U.S. 406 (1966), was that both Fourth and Fifth Amendment decisions would be applied to all non-final convictions. In the Johnson decision, the Court stated that it was returning to this "original understanding." See 50 U.S.L.W. at 4743. Thus, it is submitted that precedent supports the conclusion that Fifth Amendment cases should be accorded the same retroactive effect accorded Fourth Amendment decisions in Johnson.

The Petitioner would further observe that the other reasons relied on by the Court in adopting the Johnson rule of retroactivity have equal application to Fifth Amendment cases. Specifically, the need for the courts to "do justice to each litigant on the merits of his own case", and to "treat similarly situated defendants similarly" would appear to be independent of whether the Fourth or Fifth Amendment is being interpreted. Thus, it is submitted that Johnson should control the retroactivity of decisions interpreting the Fifth Amendment as well as the Fourth Amendment.

The Petitioner submits that the Court should grant certiorari in this case, and reverse the decision of the Court of

Criminal Appeals of Oklahoma on the basis of the retroactivity principles announced in Johnson.

The Johnson decision, which had not been announced when this case was decided below, represents a significant development in the constitutional retroactivity doctrine. In the event that the Court should decide not to review this case on the merits, the Petitioner submits that the judgment below should be vacated, and the case remanded so that the Court of Criminal Appeals of Oklahoma can further consider its holding of non-retroactivity in light of the principles announced in Johnson.

Respectfully submitted,

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BC KD

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No. 81-6782

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

MICHAEL MACK,

Petitioner,

-vs-

STATE OF OKLAHOMA,

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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ATTORNEYS FOR APPELLEE

9

July, 1982

QUESTION PRESENTED FOR REVIEW

1. Whether a Writ of Certiorari should be granted when other State Appellate Court rulings are not inconsistent on the issue of retroactivity of this Court's ruling in Carter v. Kentucky?

2. Whether this Court's ruling in Carter v. Kentucky should be applied retroactively?

3. Whether a Writ of Certiorari should be granted if a finding of retroactivity would not affect this defendant?

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United States Code

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

MICHAEL MACK, Petitioner,	)	
v.	)	No. 81-6782
STATE OF OKLAHOMA, Respondent.	)	

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The Respondent, State of Oklahoma, by and through Jan Eric Cartwright, Attorney General of the State of Oklahoma, respectfully requests that this Court to deny the Petition for Writ of Certiorari seeking review of the Opinion of the Oklahoma Court of Criminal Appeals entered on March 2, 1982, and to which rehearing was denied on March 25, 1982.

OPINION BELOW

The opinion of the Oklahoma Court of Criminal Appeals is reported as Mack v. State, 641 P.2d 1122 (Okl.Cr. 1982).

JURISDICTION

The judgment of the Oklahoma Court of Criminal Appeals was entered on March 2, 1982. A petition for rehearing was denied on March 25, 1982. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution states in pertinent part:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself. . . ."

The Fourteenth Amendment to the United States Constitution states in pertinent part:

"Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Title 28 U.S.C. § 1257(3) states:

"Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

". . . .

"(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

Title 22 O.S. 1971, § 701, provides:

"In the trial of all indictments, informations, complaints and other proceedings against persons charged with the commission of a crime, offense or misdemeanor before any court or committing magistrate in this State, the person charged shall at his own request, but not otherwise, be competent witness, and his failure to make such request shall not create any presumption against him nor be mentioned on the trial; if commented upon by counsel it shall be ground for a new trial.

STATEMENT OF THE CASE

On June 18, 1979, at approximately 9:00 p.m., Paula Ruth Perkins, left the Crystal City Bowling Alley and drove to the opposite end of the shopping center to the car wash (Tr. 14-15). She began vacuuming the backseat of her car when she felt someone approach and press against her leg (Tr. 15). She straightened up and the petitioner (herein referred to as the defendant) put a gun to her head. He told her to get into her car and not to say anything or he would kill her (Tr. 16). Paula could see the dark gun next to her temple, so she did what the defendant told her to do (Tr. 16).

Paula, as instructed, entered the backseat and put her face down in the seat (Tr. 16). She could hear more than one voice, but when she looked to see who was in her car, she was hit in the back of the head with an object that felt like the gun (Tr. 17). The defendant, Bobby Trimble and their friend, Gator, drove around for an hour and a half and the defendant used Paula's key ring, which had a mace can on it. Finally the defendant stopped on a dark road, and told Paula, whose head was bleeding, to get out of the car and not to look at them (Tr. 18). Again, Paula did as she was instructed, because she was afraid of these men.

After leaving the car, which contained her purse and keys, Paula started walking towards the lights of the town (Tr. 18). She walked to Jerry Harmons' house, where the Harmons family were sitting outside watching T.V. (Tr. 19). She told Mr. Harmons what happened and he called the police and an ambulance for Paula because her head was still bleeding (Tr. 19).

Later, the police arrived, and Paula gave them a description of her car, which was a 1973 Buick Apollo, white over blue (Tr. 123). Her car was also noticeable because it had four bumper stickers which read: Channel 2; Eight's the Place; I'm Creek Indian and Proud of It; and Fried Bread Power (Tr. 20).

Officer Cleary heard a radio dispatch on Paula's vehicle which included a description of the vehicle (Tr. 31). At approximately 1:10 a.m., he saw this described vehicle going the opposite direction (Tr. 33). He immediately turned around and observed this vehicle turn into the parking lot of the Soul Brother's Lounge (Tr. 34). Officer Cleary arrived at this parking lot as the only two people in the lot were walking towards the entrance of this club (Tr. 34). The defendant entered the club but exited immediately because he was not allowed in this club because of his attire (Tr. 36). Bobby Trimble followed the defendant into the parking lot (Tr. 38). Officer Cleary radioed for Officer Carter to back him up and then he frisked the defendant as a safety precaution. During the frisk, Officer Carter found a small can of mace on the defendant (Tr. 56). Officer Carter, also found a weapon on the sidewalk and he called the Canine Unit to the Lounge (Tr, 60).

A dog was needed to track the area to determine if anyone fled through the field next to the Lounge (Tr. 38). The dog, which was trained to pick up the freshest scent by tracking the skin cells that fall off a person, did not detect any scent which led into the field (Tr. 74). Rather, the scent the dog found led from Paula's vehicle into the Lounge (Tr. 39, 74). The defendant and Bobby Trimble were arrested for the crime charged.

Bobby Trimble confessed to the officers and he took the stand at the defendant's trial to testify on behalf of the State. He stated that he and the defendant walked around the Crystal City Shopping Center until they observed Paula vacuuming her car (Tr. 80). The defendant then pulled a gun from his waistband and forced Paula into the backseat of her car (Tr. 80). Gator, their friend, sat in the backseat with Paula, the defendant drove, and Trimble sat in the front seat. Bobby Trimble confessed to going through Paula's purse, taking $2.00 and taking the mace can. He also testified that they dropped Gator off before turning into the Lounge and that the defendant, when he saw a police car, threw the gun under the car as they exited Paula's car at the Lounge (Tr. 84,88).

Bobby Trimble stayed six days in the County Jail prior to imprisonment in the juvenile system (Tr. 90). During the six days, the defendant sent a note to Bobby in a cigarrette package (Tr. 90-93). The note instructed Bobby to tell the officers that they were walking, found this car with the keys in it and then drove it to the Lounge (Tr. 92,93). Bobby gave this note to his attorney and refused to tell this story (Tr. 91).

After the State rested its case, the defense presented the defendant's mother and the defendant's girlfriend as alibi witnesses. The defendant did not testify and he orally requested a cautionary instruction on his failure to testify at trial. However, the defendant never sought a ruling on his requested instruction and he failed to submit this requested instruction in

writing to the Court.[1] The instruction was not given. The jury deliberated and found the defendant guilty of Robbery With Firearms in the first stage of trial. In the second stage of trial, the State presented the defendant's prior Judgment and Sentence in CRF-78-3188 for Larceny of Merchandise from a Retailer. The jury again deliberated and set the punishment for the defendant at sixty (60) years in the custody of the Department of Corrections.

The defendant appealed this conviction to the Oklahoma Court of Criminal Appeals. While the appeal was pending, this Court announced its decision in Carter v. Kentucky, 450 U.S. 288 (1981), which held that the failure to deliver a cautionary jury instruction on the defendant's failure to testify, where requested, violated the Fifth Amendment which is applicable to the states through the Fourteenth Amendment. The Oklahoma Court of Criminal Appeals held that it was bound by the decision of this Court in Carter. However, since this Court did not hold that the decision was retroactive and because such instructions were held in Oklahoma to be reversible error at the time the defendant was tried, the state court held that the decision in Carter, should only be applied prospectively. The defendant's conviction was affirmed and a petition for rehearing was denied.

---

1. See United States v. Greer, 588 F.2d 1151 (6th Cir.) cert. denied, 440 U.S. 3 99 S.Ct. 1794, 60 L.Ed.2d 244 (1979) where the defendant in writing requested a no-inference instruction but he never made timely objection when the judge overlooked the instruction. Such was held not to be plain or reversible error. See also Teague v. State, 287 S.E.2d 111 (Ga.1982); Tugatuk v. State, 626 P.2d 95 (Ala. 1981); United States v. Williams, 521 F.2d 950 (D.C. Cir. 1975).

SUMMARY OF ARGUMENT

The Oklahoma Court of Criminal Appeals held that the ruling in Carter v. Kentucky should be applied prospectively because this Court did not expressly clarify whether the ruling was retroactive. The Oklahoma Court of Criminal Appeals is the only state court that has addressed this issue, thus there are no inconsistent rulings between the highest state courts.

The ruling in Carter v. Kentucky, which is the first ruling to hold that the Fifth and Fourteenth Amendments require a no-inference instruction, if requested by the defendant, should not be applied retroactively because it is in the category of cases, which express a new principle of law and overruled past precedent and which usually are not retroactive. Furthermore, the factors such as the purpose of the new ruling, the extent of reliance on the previous law and the impact of a retroactive application of the new constitutional principle on the administration of justice are persuasive for not apply the ruling in Carter v. Kentucky retroactively.

Moreover, the ruling in Carter v. Kentucky is a limited Fifth Amendment protection because such an instruction is not required unless it is requested by the defendant and it differs in its enhancement of the reliability of the fact finding process from the blanket Fifth Amendment protection against adverse inferences found in Griffin v. California. Therefore, the holding in Carter does not require the same degree of retroactivity as afforded Griffin.

However, if this Court is of the opinion that Carter should be accorded some amount of retroactivity, this Court should not exercise its discretionary jurisdiction in the present case because such a ruling would not affect the defendant's conviction since his claim should have been barred based on a state procedural rule. Accordingly, this Court should dismiss this defendant's writ of certiorari.

I

THE OKLAHOMA COURT OF CRIMINAL APPEALS DECISION IN MACK v. STATE IS NOT INCONSISTENT WITH OTHER STATE APPELLATE COURT RULINGS ON THE ISSUE OF RETROACTIVITY OF CARTER v. KENTUCKY.

The defendant asserts that the Oklahoma Court of Criminal Appeals decision, in the instant case, is inconsistent with decisions of other State Appellate Courts and therefore the Writ of Certiorari should be granted.

The State submits that the decisions in People v. Crawford, 632 P.2d 626 (Colo. App. 1981) and Mosely v. State, 402 So.2d 559 (Fla. App. 1981) are not inconsistent with the opinion of the Oklahoma Court of Criminal Appeals, because the opinions in those cases do not expressly state whether these cases were tried prior or subsequent to Carter v. Kentucky, 450 U.S. 288 (1981). Moreover, neither of these courts nor the courts in Richardson v. State, 402 So.2d 848 (Miss. 1981) or People v. Silver, 121 Cal. App.3d 533, 175 Cal.Rptr. 483 (1981) addressed the issue of retroactivity of the ruling in Carter v. Kentucky. Accordingly, the State Appellate Courts are not inconsistent on the issue of retroactivity of the ruling in Carter v. Kentucky, and therefore the writ of Certiorari should be denied.

II

THIS COURT IN CARTER v. KENTUCKY DID NOT EXPRESSLY HOLD THE RULING TO BE RETROACTIVE AND THE RULING SHOULD BE APPLIED ONLY PROSPECTIVELY.

The defendant asserts that the state court's ruling in the present case is inconsistent with the principles established by this Court and the Carter ruling should be applied retroactively at least to cases pending direct review, such as the defendant's.

The Oklahoma Court of Criminal Appeals was entitled to reach its own conclusion as to the issue of retroactivity because this Court did not expressly clarify whether the decision was retroactive. In Ruhm v. Turner, 357 F.Supp. 324, 326 (W.D. Okl. 1973) the Federal District Court cited The Annotation, Prospective or Retroactive Operation of Overruling Decision, 10 A.L.R.3d § 1371, when it stated:

> "'Moreover, although there has traditionally been a presumption that an overruling decision is intended to receive general retroactive effect, the more modern view is that unless the overruling court expressly indicates in the overruling case to what extent the overruling decision is to be given retroactive effect, lower courts are entitled to reach their own conclusions as to the issue of retroactivity until the overruling court expressly clarifies how much retroactive effectd its overruling decision is to receive.' (emphasis supplied)."

Further, this Court in Linkletter v. Walker, 381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed.2d 601 (1965) concluded "that the Constitution neither prohibits nor requires [that] retroactive effect" be given to any "new" constitutional rule. 381 U.S. at 629; Brown v. Louisiana, 447 U.S. 323, 327, 100 S.Ct. 2214, 2219, 65 L.Ed.2d 159 (1980). This Court further stated in Johnson v. New Jersey, 384 U.S. 719, 728, 86 S.Ct. 1172, 1778, 16 L.Ed.2d 882, 889 (1966):

> "'[T]he retroactivity or non-retroactivity of a rule is not automatically determined by the provision of the Constitution on which the dictate is based. Each constitutional rule of criminal procedure has its own distinct functions, its own background of precedent, and its own impact on the administration of justice, and the way in which these factors combine must inevitably vary with the dictate involved.'"

The determination of whether a decision should be accorded retroactive or prospective application focuses upon three categories of cases. United States v. Johnson, ____ U.S. ____, _____ S.Ct. _____, ____ L.Ed.2d _____ (June 21, 1982). First, if the case applied settled precedent to new or different factual situation, then the Court's decision usually applies retroactively. Id. See, e.g., Dunaway v. New York, 422 U.S. 200, 206 (1979); Spinelli v. United States, 393 U.S. 410, 412 (1969). Second, is the group of cases where this Court has expressed a new principle of law by either overruling past precedent on which the litigants relied or by deciding issues of first impression whose resolution was not clearly foreshadowed. Chevron Oil Co. v. Huson, 404 U.S. 97, 106, 92 S.Ct. 349, 355, 30 L.Ed.2d 296 (1971). Such cases are usually nonretroactive. See Desist v. United States, 394 U.S. 224, 248, 89 S.Ct. 1030, 22 L.Ed.2d 248 (1969). The third type of cases are cases where the trial court lacked authority to convict or punish the criminal defendant. United States v.

Johnson, supra. This group of cases is usually accorded full retroactivity. Id. See, e.g., United States v. United States Coin & Currency, 401 U.S. 715, 724 (1971).

The petitioner's case fits into the second category of cases, which usually are not retroactive, because this Court's ruling in Carter v. Kentucky, 450 U.S. 288, 101 S.Ct. 1112, 67 L.Ed.2d 241 (1981) announced a new principle of law and it overruled past precedent on which the litigants relied. In Carter, this Court held that the Fifth and Fourteenth Amendments of the Constitution required a court to give the jury an instruction, when requested, that no adverse inferences are to be drawn when the defendant decides not to testify at his trial.

Although, the Court in Bruno v. United States, 308 U.S. 287, 60 S.Ct. 198, 84 L.Ed. 257 (1939), held that in accord with the federal statute 28 U.S.C. § 632, which provided that the defendant's failure to testify "shall not create any presumption against him," the defendant had the right to have the jury instructed that his failure to testify did not create any presumption against him, the Court in Bruno did not reach the Fifth Amendment issue presented in Carter. Rather, this Court in Bruno merely resolved a question of federal statutory law. This Court's announcement in Carter was a new ruling and one not previously addressed by this Court because the Federal Act of March 16, 1878 did not govern the instructions in state courts. See dissent in Carter v. Kentucky, 405 U.S. at 308 (Rehnquist, J., dissenting).

In Griffin v. California, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965), this Court expressed the opinion that the trial judge was prohibited under the Fifth Amendment and the Fourteenth Amendment from asking the jury to draw adverse inferences from the defendant's failure to take the witness stand.

Subsequently, in Lakeside v. Oregon, 435 U.S. 333, 98 S.Ct. 1091, 55 L.Ed.2d 319 (1978), this Court led states to believe that the Fifth Amendment did not require a "no inference" instruction but rather such could be decided by the state law although it held that such instructions did not violate the Fifth and Fourteenth Amendments:

> "It may be wise for a trial judge not to give such a cautionary instruction over a defendant's objection. And each State is, of course, free to forbid its trial judges from doing so as a matter of state law. We hold only that the giving of such an instruction over the defendant's objection does not violate the privilege against compulsory self-incrimination guaranteed by the Fifth and Fourteenth Amendments." (Emphasis added).

See also Justice Stewart's dissenting opinion in Griffin v. California, 380 U.S. 609 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965), which provided, "The formulation of procedural rules to govern the administration of criminal justice in the various states is properly a matter of local concern." 380 U.S. at 623.

Thus, since there has been no expressed ruling that the Fifth and Fourteenth Amendment required such an instruction, whether requested or not, Oklahoma relied on its statutes which prohibited any comment on the defendant's failure to take the stand. See 22 O.S.1981, § 701. The Court's ruling in Carter overturned a longstanding and widespread practice which the Oklahoma Court of Criminal Appeals had expressly approved. 22 O.S.1981, § 701; Ellis v. State, 558 P.2d 1191 (Okl.Cr. 1977); Villines v. State, 492 P.2d 343 (Okl.Cr. 1971); Brannin v. State, 375 P.2d 276 (Okl.Cr. 1962); Russell v. State, 17 Okl.Cr. 164, 194 P. 242 (1921). The decision affects a decisional change in attitude that prevailed for many decades. See, e.g. Gosa v. Mayden, 413 U.S. 665, 93 S.Ct. 2926, 37 L.Ed.2d 873 (1973) (which held that O'Callahan v. Parker, 395 U.S. 258, 89 S.Ct. 1683, 23 L.Ed.2d 291 (1969) was nonretroactive when it did not overrule any prior decision but announced a new constitutional principle because of the increasing awareness and recognition of the important constitutional values embodied in the Fifth and Sixth Amendments).

Accordingly, this case fits clearly into the group of cases which expresses a new principle of law or an issue of first impression. Further, this new ruling overrules prior state law and statutes relied upon by the litigants. 22 O.S.1981, § 701; Ellis v. State, 558 P.2d 1191 (Okl.Cr. 1977); Villines v. State, 492 P.2d 343 (Okl.Cr. 1971); Brannin v. State, 375 P.2d 276 (Okl.Cr. 1962); Russell v. State, 17 Okl.Cr. 164, 194 P. 242 (1921). The

decision in Carter did not merely restate existing law or apply the established law to a set of facts different from the original set of facts. See United States v. Ross, 655 F.2d 1159 (D.C. Cir. 1981). Accordingly, the present case falls into the second category of cases, which usually are not retroactive.

The next part of the retroactive test, consists of an evaluation of the factors provided in Stovall v. Denno, 388 U.S. 293, 297, 87 S.Ct. 1967, 1970, 18 L.Ed.2d 1199 (1967). These consist of: the purposes of the new ruling, the extent to which law enforcement authorities may have relied upon the previous state law and the impact of a retroactive application of the new federal constitutional principle on the administration of justice. 388 U.S. at 297, 18 L.Ed.2d 1199.

Retroactively or non-retroactivity of a new constitutional rule does not turn on the value of the constitutional guaranty involved but rather on the constitutional rule or procedure, its background of precedent, its function, its impact on the administration of justice and the way these factors combine. Johnson v. New Jersey, 384 U.S. 719, 86 S.Ct. 1772, 16 L.Ed.2d 882 (1966). The issue of retroactivity must be determined in this case by looking at the peculiar traits of the specific rule in question.

First, the purpose of the rule that a no inference instruction should be given when requested "is to remove from the jury's deliberations any influence of unspoken adverse inferences." Lakeside supra, at 339, 55 L.Ed.2d 319, 98 S.Ct. 1091. In Tehan v. Shott, 382 U.S. 406, 86 S.Ct. 459, 15 L.Ed.2d 453 (1966) this Court stated:

> ". . . the Fifth Amendment's privilege against self-incrimination is not an adjunct to the ascertainment of truth. That privilege, like the guarantees of the Fourth Amendment, stands as a protection of quite different constitutional values - values reflecting the concern of our society for the right of each individual to be let alone. To recognize this is no more than to accord those values undiluted respect."

This Court in Tehan found that the new rule announced in Griffin pertained to the Fifth Amendment privilege against self-incrimination and such was not an adjunct to the ascertainment of truth, thus full retroactivity of the new rule was not required.

Further, in Carter v. Kentucky, this Court did not decide that in all criminal cases, where the defendant decides not to take the stand, that a no-interference instruction is required under the Fifth Amendment, but rather only where the defendant requests such an instruction. Therefore, this type of instruction does not greatly affect or substantially impair the very integrity of the fact finding process" because if it did, such an instruction would be required in all similar criminal cases. See Linkletter, supra. Thus, the purpose of the new rule can be achieved without applying the rule retroactively.

Further, in Stovall v. Denno, 388 U.S. 293, 97 S.Ct. 1967, 18 L.Ed.2d 1199 (1967) where the only prospective application of a rule was applied, this Court stated:

> "Although the Wade and Gilbert rules also are aimed at avoiding unfairness at the trial by enhancing the reliability of the fact-finding process in the area of identification evidence, 'the question whether a constitutional rule of criminal procedure does or does not enhance the reliability of the fact-finding process at trial is necessarily a matter of degree.' Johnson v. New Jersey, supra, 384 U.S. 728, 729, 16 L.Ed.2d at 869."

The Carter ruling was that a no-inference instruction is required by the Fifth Amendment only, when requested, by the defendant. Thus, the instruction is only mandatory to assure the integrity and reliability of our system of justice when the defendant determines as a trial tactic that the instruction will benefit him by assuring the jury that no adverse inference may be inferred from his failure to take the stand. However, the same instruction is not required in every case where the defendant fails to testify. Accordingly, such an instruction could only change the outcome on retrial in a limited number of cases, and in most cases it would not change the outcome of the jury's verdict because of other relevant instructions, voir dire exam and closing and opening arguments which often stress that the burden is upon the state and that the defendant is not required to take the stand. Thus, the enhancement of the reliability of the fact-finding and the probability of injustice in the situation differs greatly from cases involving adverse inferences such as Griffin and fully retroactive cases involving absence of counsel at

arraignment (Hamilton v. Alabama, 368 U.S. 52, 82 S.Ct. 157, 7 L.Ed.2d 114 (1961)), at trial (Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963)), and on appeal (Douglas v. California, 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963)) and cases involving judicial procedure for determining the voluntariness of a confession (Jackson v. Denno, 378 U.S. 368, 84 S.Ct. 1773, 12 L.Ed.2d 908 (1964)). Further, the enhancement of the reliability of truth-finding by such an instruction is not so great or substantial as to require this type of instruction in every case where the defendant fails to testify. Therefore, for the reason that enhancement of the reliability of the fact-finding process is not great or substantial and for the reason that this no inference instruction is not required in every case where the defendant fails to testify, the ruling in Carter should only be applied prospectively. See Stovall v. Denno, supra.

Secondly, the extent of the reliance which had been placed on the old rule in Oklahoma has been substantial. Title 22 O.S.1981, § 701 forbid any comment on the defendant's failure to testify and such was consistently held to be reversible error. Ellis v. State, supra; Villines v. State, supra; Brannin v. State, supra; Russell v. State, supra. Furthermore, Lakeside, supra invited the States to forbid trial judges from giving such instructions. Thus, the State of Oklahoma in good faith relied on 22 O.S.1981, § 701. See England v. Louisiana State Board of Medicine Examiners, 375 U.S. 411, 84 S.Ct. 461, 11 L.Ed.2d 440 (1964). See also Tehan v. Shott, supra.

The last important factor to consider is the effect of the administration of justice of the retroactive application of the new rule. A retroactive application of Carter would effect every state which had adopted a no comment rule and where the defendant had requested such an instruction.[1] The full retroactivity of

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2. At least five states prohibited the giving of such an instruction. Carter v. Kentucky, 450 U.S. at 290, note 2. They are Kentucky, see Carter v. Commonwealth, No. 79 S.C.-452 -Mr May 13, 1980 (unreported) aff. 598 S.W.2d 763, rev. 450 U.S. 288, 101

the Carter decision could be grave indeed. See Tehan v. Shott, supra. In most of those cases, witnesses and evidence would be no longer a available and retrial would be unlikely. As stated in Tehan:

> ". . . To require all of those States now to void the conviction of every person who did not testify at his trial would have an impact upon the administration of the criminal law so devasting as to need no elaboration."

Accordingly, full retroactivity would impose a substantial burden upon the adminstration of justice.

The State also submits that cases, such as the instant case, which were on appeal when Carter was decided, should not require retrial based upon the Carter decision. Rather Carter, should apply prospectively and therefore be inapplicable to any case which was tried before Carter. Although, this Court in O'Connor v. Ohio, 382 U.S. 286, 86 S.Ct. 445, 15 L.Ed.2d 337 (1966) and in Tehan v. Shott, 382 U.S. at 409, note 2, 15 L.Ed.2d at 455, applied Griffin retroactively to all cases not yet final, the Fifth Amendment ruling in Griffin was not based upon a defendant's request but rather upon a blanket Fifth Amendment requirement. This Court has not held that the Fifth Amendment requires a no inference instruction in every case when the defendant fails to testify, but rather only in cases where the defendant requests such an instruction. Thus, a trial absent such an instruction has not been held to be unconstitutional when such an instruction is not requested. Therefore, the lack of such an instruction is not always fundamental error and the mere lack of an instruction does not substantially impair the trial's truth-finding function. For these reasons the holding in Carter, differs from the holding in Griffin and therefore, the same amount of retroactivity is not required.

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2. (Continued). S.Ct. 1112, 67 L.Ed.2d 241 (1981), Minnesota, see State v. Sandve, 279, Minn. 229, 232-234, 156 N.W.2d 230, 233-234, but see State v. Grey, 256 N.W.2d 74, 77-78 (the instruction may be necessary in some cases to prevent manifest injustice); Nevada, see Jackson v. State, 84 Nev. 203, 208, 438 P.2d 795, 798, Nev. Rev. State. § 175.181 (1979); Oklahoma, see Brannin v. State, 375 P.2d 276, 279-280 (Crim. App.), Hanf v. State, 560 P.2d 207, 212 (Crim. App.); and Wyoming, see Kinney v. State, 36 Wyo. 466, 472, 256 P. 1040, 1042.

In conclusion, Carter should be applied prospectively because; the absence of a no-inference instruction is not automatically fundamental error or a substantial impairment of the truth-finding fuction, the Court of Criminal Appeals relied on stautory and case law which held that such instructions were reversible error, this Court's ruling is a new ruling which overturned existing state statutory and case law, the administration of justice would be affected and the ruling in Carter differs from the ruling in Griffin in the degree its ruling affects the enhancement of the reliability of the fact-finding process at trial.

III

THE WRIT OF CERTIORARI SHOULD NOT BE GRANTED BECAUSE A FINDING OF RETROACTIVITY WOULD NOT AFFECT THIS DEFENDANT.

A finding by this Court that Carter v. Kentucky is retroactive would not affect this defendant because he did not request a written instruction nor did he obtain a ruling on his oral instruction and thus his personal claim to retroactivity of this ruling is barred based on a state procedural rule.[3] Therefore, the Court should not exercise its discretionary jurisdiction to answer a hypothetical question, the answer of which would not affect the defendant's conviction.

CONCLUSION

While this Court's Rule 17 is, by its own terms, not exclusive in setting out grounds for exercise of the Court's discretionary jurisdiction, it does provide guidance as to the importance of the cases this Court will consider. The present case confronts the Court with no split among the Circuits or between a Circuit and the highest court of any State. Nor does the Court need to exercise its supervisory powers herein. Although, the

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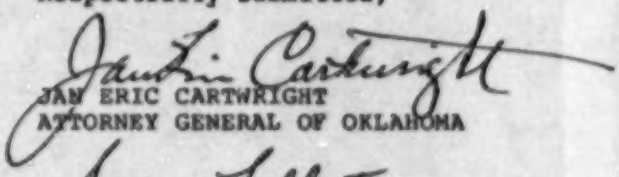
3. See Graves v. State, 563 P.2d 646 (Okl.Cr. 1977); Lane v. State, 579 P.2d 991 (Okl.Cr. 1978); Luckey v. State, 529 P.2d 994, 996 (Okl.Cr. 1974). See also note 1, supra.

defendant raises a federal question it does not require the attention of this Court. The State court below has acted in accordance with decisions of this Court and has found that the petitioner's rights have not been violated. This case simply does not merit expenditure of the Court's scarce resources. Certiorari should be denied.

The State, having answered the petitioner's assignments of error by both argument and citation of authority, respectfully requests this Honorable Court to deny the petitioner's writ of Certiorari.

Respectfully submitted,



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ATTORNEYS FOR RESPONDENT

AFFIDAVIT OF SERVICE

STATE OF OKLAHOMA)
: ss.
COUNTY OF OKLAHOMA)

Susan Talbot, being first duly sworn, upon her oath does state:

1. That I am an Assistant Attorney General for the State of Oklahoma and one of the attorneys of record in the above-styled case representing the Petitioner, State of Oklahoma.

2. That on July 9, 1982, prior to 5:00 p.m., Central Standard Time, I caused to be placed forty (40) copies of the above Petition for a Writ of Certiorari to the Oklahoma Court of Criminal Appeals in an envelope properly addressed to the Clerk of this Court, with postage prepaid, which was deposited in the United States Mail in Oklahoma City, Oklahoma.

3. 1 Copy of the foregoing Petition were mailed, postage prepaid to:

Gary Peterson, Esq.
510 Fidelity Plaza
Oklahoma City, OK 73102

4. All parties required to be served have been served.

Further affiant sayeth not.

Susan Talbot
SUSAN TALBOT

Subscribed and sworn to before me this 9th th day of July, 1982.

Martha G. Simon
Notary Public

My Commission Expires:
September 14, 1985